ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

November 22, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Restoring Internet Freedom, WC Docket No. 17-108

Dear Ms. Dortch,

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With over 35,000 dues-paying members and well over 1 million followers on social networks, we focus on promoting policies that benefit both creators and users of technology. We offer the following comments to respond to recent efforts to encourage the FCC to preempt state privacy laws and explain in detail why the FCC lacks legal authority to do so.

A number of parties[1] have requested that the FCC take this dramatic step, despite a lack of notice in the original NPRM, of preempting state broadband privacy laws[2] at the same time the FCC seeks to no longer apply federal communications privacy law to the Internet Service Provider (ISPs) industry and instead intends to transfer responsibility for privacy to the Federal Trade Commission (FTC).[3]

However, the Communications Act does not support such a wide-reaching preemption. Within the very provisions the preemption proponents cite in their favor, there exist similar Congressional commands to avoid construing them to limit state privacy laws.[4] Furthermore, it should not be lost on the parties asking the FCC to eliminate their federal obligations as Title II common carriers that such an abandonment of legal authority by the federal agency greatly reduces the preemptive power of the FCC.[5]

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[1] *See Ex Parte* of Verizon, *FCC Authority to Preempt State Broadband Laws white paper*, WC Docket No. 17-108 (October 25, 2017); *See also Ex Parte* presentation of CTIA, WC Docket No. 17-108 (November 13, 2017).
[2] *See* Nevada Revised Stat. § 205.498; *see also* Minn. Stat. §§ 325M.01 to .09.
[3] Ajit Pai & Maureen Ohlhausen, *No, Republicans didn't just strip away your Internet privacy rights*, WASHINGTON POST OP-ED, (April 4, 2017), *available at* https://www.washingtonpost.com/opinions/no-republicans-didnt-just-strip-away-your-internet-privacy-rights/2017/04/04/73e6d500-18ab-11e7-9887-1a5314b56a08_story.html?utm_term=.d7ae71b429ce.
[4] 47 U.S.C. § 230(e)(4).
[5] The traditional questions that must be answered to test for preemption are as follows: 1) Did Congress express a clear intent? 2) Is there conflict between federal and state law where it would be impossible to comply with both? 3) Did Congress imply a barrier to state regulation? 4) Has Congress legislated so comprehensively that it occupied the field? 5) Does state law stand as an obstacle to the objectives of Congress? In the near complete absence of

It is with some irony that the parties who actively lobbied Congress[6] to repeal the federal uniform standards for broadband privacy decry the empowerment and willingness of state legislatures to fill in the void. The FCC should refrain from attempting to save preemption proponents from their own political successes. Should the FCC reclassify broadband Internet Service Providers (ISPs) into "information services" and remove their current federal privacy obligations[7] it must absolutely refrain from interfering with the states' rights to protect the private information. Americans value the ability to control their private data now more than ever as they face repeated and systemic breaches of personal information.

Lastly, as the FCC noted in its NPRM,[8] the larger still unanswered question as to whether the Federal Trade Commission (FTC) even has legal authority over telephone companies[9] begs caution by the FCC in the area of privacy.

Data Monetization Efforts by ISPs is unrelated to the provisioning of Broadband Internet Access Service and is an Intrastate Business Practice Subject to State Regulation

The Communications Act envisions federal and state partnerships when it is possible to draw a clear division between intrastate and interstate activities.[10] The Communications Act also allows states to regulate business practices of ISPs so long as the activity being regulated is intrastate. That does not mean that the FCC is empowered to preempt activities that may include some interstate components solely on the premise that interstate commerce also occurs. As the Supreme Court noted in its *Louisiana Public Service Commission* decision,

"[T]he *Act would seem to divide the world of domestic telephone service in two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the states would retain exclusive jurisdiction – in practice, the realities of technology and economics belie such a clean parceling of responsibility."*[11]

Consumer protection laws that guard personal privacy and grant a legal right to say no to a business that wishes to monetize personal information are inherently intrastate regulations. The

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applicable federal law for information services, a preemption analysis is restrained to determining if Congress implied preemption.; *See also Louisiana Public Service Com'n v. F.C.C.,* 476 U.S. 355 (1986).

[6] CTIA Statement on House Vote in Support of CRA Resolution on Broadband Privacy (March, 28, 2017) *available at* https://www.ctia.org/industry-data/press-releases-details/press-releases/ctia-statement-house-vote-cra-resolution-broadband-privacy.

[7] 47 U.S.C. § 222.

[8] Notice of Proposed Rulemaking, Restoring Internet Freedom, WC Docket No. 17-108, at FN 157 (the FCC itself noted that this case stands as a direct obstacle to FTC oversight of telephone companies that also provide broadband service).

[9] *FTC v. AT&T Mobility*, 835 F. 3d 993 (9th Cir. 2016) (The 9th Circuit is expected to render a decision on whether the common carrier exclusion rule prohibits the FTC from overseeing companies such as AT&T and Verizon due to their telephony product granting them common carrier status. It is worth noting that reclassifying broadband as common carriage will not bypass the bar on the FTC should AT&T prevail in 2018).

[10] 47 U.S.C. § 152(b) (stating that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, *practices*, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier")

[11] *Louisiana Public Service Com,n v. F.C.C.*, 465 U.S. 355 (1986).

FCC must not lose sight as to what is explicitly being asked here. Preemption proponents are willfully conflating the transmission of Internet traffic across state lines (an interstate activity) with the data collection efforts of ISPs for separate business arrangements with third parties (an intrastate activity). Every valuable piece of personally identifiable information is emitted locally, whether geolocation data, the websites you ask your local ISP to transmit to you, or the identity of applications one has installed on their handheld device. The data collection efforts that ISPs will engage in to establish such business arrangements do not require any crossing of state lines to be effective.

By applying the FCC's "impossibility test" (as in the Voice over Internet Protocol context),[12] we can distinguish intrastate and interstate activities in the field of privacy law with relative ease. Almost every instance of privacy invasion by the ISP industry requires an intrastate activity such as preinstalling software in newly sold phones within a state,[13] injecting undeletable (and illegal) tracking cookies in outbound traffic by their customers,[14] and hijacking the search queries when sent to the local ISP from their customers' home[15] before they reached the destination point on the Internet. In virtually every instance the infrastructure relied upon for the collection efforts is housed within state lines—from the local server in both wired and wireless instances to the smartphone itself maintaining a log and reporting it to the ISP.

It would be a misreading of the statute to categorically proclaim that because the transmission of broadband service is an interstate service that every single side business arrangement between ISPs and other businesses is also necessary for that service[16] and shielded from state laws. States are fully empowered to regulate local business practices[17]; moreover, under the Vonage Preemption Order, the FCC was careful to limit its reach, even with a service such as VoIP that *is* categorically an interstate commercial product, and refused to argue that no state regulation was permissible. Indeed, such a reading would defeat the purposeful division Congress set out in the Communications Act for joint federal and state oversight of the ISP industry.

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[12] Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).
[13] Jeremy Gillula, *Five Creepy Things Your ISP Could Do if Congress Repeals the FCC's Privacy Protections*, DEEPLINKS BLOG (MARCH 19, 2017), *available at* https://www.eff.org/deeplinks/2017/03/five-creepy-things-your-isp-could-do-if-congress-repeals-fccs-privacy-protections.
[14] *Id*.
[15] *Id*.
[16] For example, ECPA contains a course of business exemption much like Section 222, but courts have not interpreted every opportunity to raise revenues as exempt from the consent requirements. Only the components of the communications service that must, as a matter of necessity, handle personal sensitive information, is considered part of the ordinary course of business. Nothing that is envisioned by ISPs engaging with monetizing private consumer data with 3rd parties would qualify as part of an ISP's ordinary course of business under ECPA; *see also* Jim Dempsey, Ari Schwartz, & Alissa Cooper, *An Overview of the Federal Wiretap Act, Electronic Communications Privacy Act, and State Two-Party Consent Laws of Relevance to the NebuAd System and Other Users of Internet Traffic Content from ISPs for Behavioral Advertising*, CENTER FOR DEMOCRACY AND TECHNOLOGY (July 8, 2008), *available at* https://cdt.org/files/privacy/20080708ISPtraffic.pdf [hereinafter CDT memo].
[17] 47 U.S.C. § 152(b) (Congress fully envisioned and directly empowered in the Communications Act the power of states to regulate the intrastate business practices of ISPs).

Section 230(e)(4) of the Communications Act Explicitly Restrains the FCC in Regards to Interfering with State Privacy Laws

Preemption proponents place a substantial amount of emphasis on Section 230(b)(2) [18] as both a mandatory command on the FCC and a wide-reaching preemption catchall provision. However, as the court said in the *Comcast decision*,[19] "Policy statements are just that—statements of policy. *They are not delegations of regulatory authority* (emphasis added)." Even if a court were to depart from the past readings of Section 230 and give the policy statement favoring deregulation[20] more weight, it must be read in its entirety where Congress expressly laid out that it should not be construed to limit state privacy laws.[21]

Any "similar" communications privacy state law as Section 230(e)(4) lays out includes the dozens of state proposals to apply Section 222-type privacy laws to ISPs following the Congressional Review Act (CRA) repeal of broadband privacy as well as currently existing law in Minnesota and Nevada. The shared foundation between ECPA and the now-repealed broadband privacy rules strongly leans in favor of finding such state laws and proposals as "similar."[22] ECPA's obligations include securing consent, prohibiting the disclosure of content, and limiting ISPs use of customer information to the course of business exemptions. Thematically the now-repealed broadband privacy rules operated much in the same manner as does the underlying Section 222.

The two are in fact so related that prior to the application of Section 222 over cable ISPs, the controversial privacy-invasive practices that came from the industries' initial foray into behavioral advertising[23] were viewed as possible ECPA violations.[24] In addition, Congressman Joe Barton and Congressman Edward Markey wrote letters to industry expressing concerns that plans to use personal information of their customers would also run afoul of Section 631 privacy provisions and subsequently the industry delayed their advertising plans.[25] Even after Congress repealed the FCC privacy rules, one notable legal scholar believed ECPA provided similar restraints on ISPs as the broadband privacy rules.[26]

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[18] 47 U.S.C. § 230(b)(2) states as policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"
[19] *Comcast Corp. v. FCC*, 600 F. 3d 642 (D.C. Cir. 2010) (hereinafter *Comcast decision*).
[20] 47 U.S.C. § 230(b)(2).
[21] 47 U.S.C. § 230(e)(4) explicitly states that it should have "no effect on communications privacy law" citing the Electronic Communications Privacy Act (ECPA) and "*any similar State law"* (emphasis added).
[22] Merriam-Webster defines "similar" as "alike in substance or essentials" or "having characteristics in common."
[23] Jeremy Gillula, *Five Creepy Things Your ISP Could Do if Congress Repeals the FCC's Privacy Protections*, DEEPLINKS BLOG (MARCH 19, 2017), *available at* https://www.eff.org/deeplinks/2017/03/five-creepy-things-your-isp-could-do-if-congress-repeals-fccs-privacy-protections.
[24] CDT memo.
[25] Ryan Singel, *Congressman Ask Charter to Freeze Web Profiling Plan*, WIRED (May 16, 2008), available at https://www.wired.com/images_blogs/threatlevel/files/letter_charter_comm_privacy.pdf. (copy of the letter can be found at https://www.wired.com/images_blogs/threatlevel/files/letter_charter_comm_privacy.pdf).
[26] Orin Kerr, *The FCC's Broadband Privacy Regulations Are Gone. But Don't Forget About the Wiretap Act*, WASHINGTON POST (Apr. 6, 2017), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/06/the-fccs-broadband-privacy-regulations-are-gone-but-dont-forget-about-the-wiretap-act/?utm_term=.8f4acbcd00ef.

More generally, the FCC's stated deregulatory goals did not contemplate the preemption of consumer privacy protection laws. In the FCC's "Vonage Preemption Order"[27] the agency explained that the "policy of non-regulation refers primarily to economic, public-utility type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws."[28] Public-utility regulations serve the purpose of ensuring every person has access to a service as a necessary utility. Privacy laws are firmly grounded in the realm of commercial consumer protection.

Emphasizing this point, then-Chairman Powell noted that "the Commission expresses no opinion here on the applicability to Vonage of state's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing and advertising."[29] In essence, preemption proponents are asking the FCC to stretch its original deregulatory policy goals over information services to every commercial dealing that such service might engage in, in sharp contrast to its more measured history.

Section 706 Does Not Confer Authority to Preempt State Privacy Laws Because Privacy Protections Have Been Shown to Improve Broadband Adoption

The FCC's ability to rely on Section 706 authority is premised on the agency "removing barriers to infrastructure investment" when advanced telecommunications capability is not being "deployed to all Americans in a reasonable and timely fashion." The findings the FCC must make to determine what constitutes a barrier must be "reasonable and grounded in substantial evidence."[30] The record as it exists[31] and findings made by several federal agencies[32] including the FCC itself show that privacy protections improve broadband adoption as more sensitive information is passed online. As a result, currently existing determinations by the expert agency counsel against finding privacy protections as barriers to the deployment of broadband. Privacy protections actually fulfill the goals of 706 by improving adoption of broadband.

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[27] Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).
[28] *Id*. at 14, FN. 78.
[29] Statement by Chairman Michael Powell Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, (Nov. 9, 2004), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-254112A2.pdf.
[30] *Verizon v. FCC*, 740 F. 3d 23 (D.C. Cir. 2014).
[31] Dozens of ISPs have explicitly requested the FCC refrain from reclassifying them into information services while asserting in the record that they have encountered no barriers to investment under the current network neutrality and privacy rules. *Available at* https://www.eff.org/files/2017/06/27/isp_letter_to_fcc_on_nn_privacy_title_ii.pdf.
[32] NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities* (May 13, 2016), available at https://www.ntia.doc.gov/print/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities; *See also* Federal Trade Commission comments to the FCC, WC Docket No. 16-106 (May 27, 2016), available at https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-federal-trade-commission-federal-communications-commission/160527fcccomment.pdf (citing how risks to privacy suppress consumer willingness to engage in online transactions and other economic activity); *See also* FEDERAL COMMUNICATIONS COMMISSION, *2016 Broadband Progress Report*, GN Docket No. 15-191 (January 29, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf (noting that "if consumers have concerns about the privacy of their personal information, such concerns may restrain them from making full use of broadband services, thereby lowering the likelihood of broadband adoption and decreasing consumer demand").

Neither the Verizon filing[33] nor the CTIA filing[34] contains the requisite factual data needed to substantiate a claim of authority under 706. Even when the FCC has presented such factual data, as was the case in its effort to preempt municipal broadband bans by states, it was unclear if 706 provided preemptive authority.[35] Notably, some are skeptical[36] that Section 706 grants any authority at all to preempt any state laws in any form.

The Congressional Review Act Only Restrains Federal Agencies

The Congressional Review Act (CRA) was enacted to provide Congress an expedited process to repeal a federal regulation that it disagreed with, while leaving the underlying statute intact.[37] Nowhere within the statutory text of the CRA is there an express statement that Congress desired the CRA to further preclude states from exerting their own independent sources of authority to regulate.[38] That is because state regulation was never the intended target of the CRA. It is undeniable that the CRA repeal undermined enforcement of Section 222,[39] but it is beyond the purpose of the statute to find that it carries preemptive effect.[40]

It was not long ago that the very same preemption proponents who are seeking assistance from the FCC to combat state privacy laws regularly asserted at the state level that the CRA repeal of the broadband privacy rules had no impact on the legal landscape.[41] In fact, FCC Chairman Ajit Pai repeatedly asserted to Congress after public outcry from the broadband privacy repeal that the ISP industry was still regulated under Section 222 of the Communications Act despite the CRA repeal as well as "other applicable federal and *state privacy*, data security, and breach notification laws.[42]

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[33] *Ex Parte* of Verizon, *FCC Authority to Preempt State Broadband Laws white paper*, WC Docket No. 17-108 (October 25, 2017).
[34] *Ex Parte* presentation of CTIA, WC Docket No. 17-108 (November 13, 2017).
[35] http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0189p-06.pdf
[36] As Commissioner Pai noted in his dissent titled "*Oral Statement of Commissioner Ajit Pai on FCC's Unlawful Attempt to Override Tennessee and North Carolina Law*" to the FCC decision to utilize Section 706 authority to preempt municipal broadband bans in Tennessee and North Carolina, it is a question as to whether Section 706 confers *any* power to preempt state laws. Statement available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-332255A5.pdf.
[37] Amber Phillips, *The Obscure Law Allowing Congress to Undo Obama Regulations on Guns and Coal in a Matter of Days*, WASHINGTON POST (February 3, 2017), available at https://www.washingtonpost.com/news/the-fix/wp/2017/02/03/the-obscure-law-allowing-congress-to-undo-obama-regulations-on-guns-and-coal-in-a-matter-of-days.
[38] Pub. L. 104-121
[39] Dallas Harris, *Setting the Record Straight: What the Congressional Review act Means for the FCC's Broadband Privacy*, PUBLIC KNOWLEDGE (March 16, 2017), available at https://www.publicknowledge.org/news-blog/blogs/setting-the-record-straight-what-the-congressional-review-act-means-for-the.
[40] The CRA for example can be used to repeal a regulation that preempted state laws and as a result, restore state regulation in an arena that the federal agency felt the need to preempt in the first place.
[41] Letter to House Majority Leader Jennifer Williamson, Oregon State Legislature, *available at* https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/124476 (CTIA claimed unequivocally that the "recent Congressional action did not change privacy protections for wireless consumers" but are now claiming it created great preemptive power for the FCC to utilize).
[42] Letter to FCC Chairman Ajit Pai to Democratic Senators regarding the current status of privacy law, (March 7, 2017), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0317/DOC-343949A1.pdf.

FCC Authority to Preempt under Title III Does Not Reach Business Practices Unrelated to the Provisioning of Wireless Service

The general authority of the FCC to regulate the deployment of wireless networks and licenses under Section 303[43] (also referred to as Title III authority) does grant the FCC the power to preempt states in the arena of wireless services, but that authority has its limits. For example, the FCC can block localities when they try to regulate interference[44] or technical standards[45], but they cannot preempt states from regulating what is displayed on your wireless bill.[46]

It is not clear that the FCC can reach so far under its Title III authority to block states that want to regulate business practices that are unrelated to the underlying service being offered. As noted earlier, the practice of monetizing the personal information of users with third parties is an intrastate business practice[47] and wholly unnecessary to the provisioning of wireless broadband service. A company does not need to monetize an individual's web browsing history in order to route their traffic over wireless network. It would be logical to deem 3rd party business relationships as additional revenue raising opportunities wholly separate from broadband transmission.

FCC Must Refrain from Further Complicating the Privacy Landscape While FTC Jurisdiction Remains in Doubt

The only reason dozens of state legislatures have delved into the legal landscape of ISP privacy is because Congress repealed the ISP privacy rules.[48] To date, the FCC has not fully studied its own legal authority to protect consumer privacy despite requests from ISPs across the country.[49] It appears that the general intent of the agency in light of consumer privacy is to extinguish its own authority and allow the FTC to be the sole federal regulator in this space. However, until the FTC has clear legal authority over the very industries asking the FCC to preempt state power, it would be incredibly unwise to risk in just a few short months a complete absence of federal authority at both the FCC and FTC while temporarily hamstringing state privacy enforcement should AT&T win for a second time its case against the FTC.[50]

Sincerely,

Ernesto Falcon
Legislative Counsel
Electronic Frontier Foundation

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[43] U.S.C. § 303.
[44] *Southwestern Bell Wireless Inc. v Johnson County Bd. Of County Com'rs*, 199 F. 3d 1185 (10th Cir. 1999).
[45] *City of New York v. FCC*, 486 U.S. 57 (1988)
[46] *National Ass'n of State Utility Consumer Advocates v. FCC*, 457 F. 3d 1238 (11th Cir. 2006).
[47] 47 U.S.C. § 152(b).
[48] National Conference of State Legislatures, *Privacy Legislation Related to Internet Service Providers* (August 4, 2017), available at http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx#ISPs.
[49] Dozens of ISPs across the country have requested clarity from the FCC in how Section 222 applies to them after the CRA repeal, available at https://www.eff.org/files/2017/06/27/isp_letter_to_fcc_on_nn_privacy_title_ii.pdf.
[50] *FTC v. AT&T Mobility*, 835 F. 3d 993.